No. 87-182

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In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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THE PETITION FOR WRIT OF CERTIORARI IS NOT MOOT

Respondent Clark Equipment Company argues that the Petition for Writ of Certiorari is moot because "the ruling below is supported by the Court of Appeals' determination of an independent issue (insufficiency of evidence as to causation)" (Brief of Respondent at 2). According to Clark:

> The Court of Appeals ruled in Respondent's favor on the issue of lack of qualification of plaintiff's sole witness as to causation and found that there was not sufficient proof of causation to allow Aloe's negligence claim to go to the jury. This finding was unanimous. On this basis, the Court of Appeals remanded to the District Court for entry of judgment for defendant.

Id. at 1.

This is totally incorrect for two reasons. First, the Third Circuit did not remand on the basis of the causation issue. The *only* basis for reversing the trial court's denial of Clark's motion for judgment n.o.v. was the Court of Appeals' conclusion that damage to the product itself is not recoverable in tort. Second, and equally important, petitioner Aloe Coal Company would be entitled to a new trial should this Court reverse the Third Circuit and hold that Pennsylvania law does allow recovery for damage to the product itself.

I.

While the Third Circuit did remand with directions to enter judgment for Clark, it did *not* do so on the basis of causation. Indeed, the Court of Appeals *refused* to remand for entry of judgment on this basis, for it expressly declined to decide whether Clark was entitled to judgment n.o.v. on the causation issue alone. In the words of Judge Aldisert:

> Viewing the record in the case in the light most favorable to the plaintiff, we do not find a "minimum quantity" of evidence of causation. Accordingly, we conclude that the district court should not have submitted Aloe's negligence claim

> to the jury. But this does not end our inquiry. We must now decide if Clark was entitled to judgment n.o.v. on this issue alone.
>
> * * *
>
> [W]e are not required to resolve this issue here, and indeed, we prefer not to because the question was not addressed by counsel by brief or argument on appeal or in the post-trial motions. We need not meet this issue because we hold that, as a matter of law, the plaintiff was not entitled to the damages it sought.

Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 115, 116 (3d Cir. 1987).

The *only* basis for reversing the District Court's denial of Clark's motion for judgment n.o.v. was the Third Circuit's conclusion that Aloe Coal cannot recover for damage to the product itself.[1]

II.

The causation issue revolved around the testimony of Aloe Coal's expert, Michael Drewnoski. As the Court of Appeals' opinion explains:

> Aloe relied solely on the testimony of one person to establish causation. He was Michael

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1. The Court of Appeals concludes its opinion by stating: (1) that damage to the product itself is not recoverable, and (2) "*[f]or this reason,* we will reverse the district court's denial of Clark's motion [.]" 816 F.2d at 119 (emphasis added).

> Drewnoski, a sales representative for Mendes & Company, whose position required him to determine the costs of repairing and replacing damaged equipment. Over Clark's objections, the district court allowed Drewnoski to give expert testimony regarding the cause of the tractor shovel fire. Drewnoski's opinion was that the fire was caused by a leak in one of the hydraulic lines. App. at 318a.

Id. at 114. The Third Circuit concluded "that the district court abused its discretion by allowing the witness to testify regarding the cause of the tractor shovel fire," *id.*, and it also held that "the totality of causation evidence, *minus the Drewnoski testimony*, was insufficient to send the case to the jury." *Id.* at 115 (emphasis added).

The question, therefore, became whether Clark was entitled to judgment n.o.v. on this issue alone. The inquiry was framed by the court below as follows:

> [I]t is clear that in considering a post-trial motion for a new trial the court is free to consider the abridged record, that is, in this case, a reconstructed record that did not include Drewnoski's testimony. See *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 251 (1940). But the same clarity in the law is not present when the post-trial motion is for judgment n.o.v.

Id.

Judge Aldisert and the other members of the Third Circuit panel did not resolve this question, but the Court of Appeals' opinion implicitly recognized that the only proper cure for the

admission of Drewnoski's testimony would be *a new trial* rather than entry of judgment for Clark. As the court explained:

> We have carefully examined the opinions from the Fifth and Eighth Circuits, and New Mexico, but regrettably, we find no reasoned elaboration to support their thesis that "[i]n ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." [*Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973).]
>
> The closest to an explanation forthcoming in the cases appears in *Midcontinent Broadcasting Co.*:
>
> > The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of judgment n.o.v. was not a proper remedy.
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> 471 F.2d at 359.

Id. at 116.[2]

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2. The Third Circuit also cited *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Sumitomo Bank of California v. Product Promotions,* (Cont'd)

A new trial is the correct remedy for the erroneous admission of evidence. The most important reason for this rule springs from the different types of error that new trial and judgment n.o.v. are intended to address.

> Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors and admission or rejection of evidence or instructions to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). A new trial is the only available cure for errors in the "admission or rejection of evidence," and a court that chose instead to grant judgment n.o.v. based upon an abridged or reconstructed record would be invading the province of the jury.

As the Eighth Circuit recognized in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (1973), any other rule would place a plaintiff such as Aloe Coal in "a relative position of unfair reliance." Had Aloe Coal been forewarned during the trial that Drewnoski's expert testimony was inadmissible, it would have altered its entire trial strategy

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(Cont'd)
Inc., 717 F.2d 215 (5th Cir. 1983); *Townsend v. United States Rubber Co.*, 74 N.M. 206, 392 P.2d 404 (1964).

in an effort to present other evidence from which the jury could reasonably conclude that the tractor shovel fire was caused by a ruptured hydraulic line in the machine.[3] Aloe could also have supplied "further foundation or even totally different evidence," *id.*, in support of its theory of liability. When coupled with the unchallenged evidence that Aloe Coal did present,[4] this would have amounted to sufficient evidence of causation in the trial court.

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3. Aloe Coal could have offered Drewnoski as a fact witness, for example. Drewnoski appraised the damage shortly after the fire, and his careful examination of the tractor shovel revealed which parts of the equipment were damaged by the fire. Drewnoski could have testified that the heaviest burning was centered in the area where the hydraulic lines were located (Court of Appeals App. at 310a-319a).

4. During the actual trial, Aloe Coal presented evidence that Clark had knowledge of some *fifty* substantially similar, prior fires in the same model tractor shovel (Court of Appeals App. at 63a-64a, 67a-97a, 107a-109a, 143a-144a, 490a-491a, 520a-522a, 528a-536a, 597a, and 690a). Clark formed an internal task force to investigate and recommend steps to prevent such fires (App. at 460a, 462a, 530a, 576a, 595a-596a, and 599a-602a), and Aloe Coal called to the stand a number of the Clark enqineers involved in this effort, including chief product engineer Chester Reed, chief product safety engineer Walter Black, and engineer Clyde Crandall.

Testimony demonstrated: (1) that the task force concluded that a ruptured hydraulic line could cause the tractor shovel to catch on fire (App. at 530a, 533a-534a, and 536a-544a); (2) that the task force recommended a modification to the machine (App. at 502a-503a, 517a, 548a-549a, and 602a); (3) that no fires had been reported on tractor shovels equipped with this modification (App. at 502a-503a), and (4) that neither Aloe Coal nor the distributor that sold that tractor shovel to Aloe Coal were notified of the fire hazard without the modification or Clark's attempts to prevent such fires (App. at 161a-163a, 166a, 215a-216a, 287a-288a, 382a-383a, 400a-401a, 430a, 554a, and 604a).

In addition, testimony by Aloe Coal employees eliminated Aloe Coal's own negligence in the maintenance and use of the machine as a cause of the fire (App. at 152a, 157a, 178a-186a, 202a-217a, 267a-277a, 579a-582a, 684a, and 686a-698a), and Aloe Coal demonstrated that additional precautions would have been taken had Clark warned of the potential for catastrophic fires (App. at 161a, 165a, and 169a).